



Tuesday, May 30, 2023

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Here's what SC has ruled

Can the govt claim immunity when entering contracts under the President's name? Here's what SC has ruled

Article 299 of the Constitution provides that "all contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President or by the Governor of the State".

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New Delhi | Updated: May 30, 2023 13:19 IST





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A view of Supreme Court of India. (Express Photo By Amit Mehra)

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The Supreme Court has held that the government, when entering into a contract under the President's name, cannot claim immunity from the legal provisions of that contract under Article 299 of the Constitution, in a recent case.

A Bench led by Chief Justice of India (CJI) DY Chandrachud said, "Having considered the purpose and object of Article 299, we are of the clear opinion that a contract entered into in the name of the President of India, cannot and will not create an immunity against the application of any statutory prescription imposing conditions on parties to an agreement, when the Government chooses to enter into a contract".

The case dealt with an application filed by Glock Asia-Pacific Limited, a pistol manufacturing company, against the Centre regarding the appointment of an arbitrator in a tender-related dispute.

First, what is Article 299 of the Constitution?

Article 298 grants the Centre and the state governments the power to carry on trade or business, acquire, hold, and dispose of property, and make contracts for any purpose, while Article 299 delineates the manner in which these contracts will be

concluded. Articles 298 and 299 came after the Constitution came into effect and the government entered into contracts even in the pre-independence era. According to the Crown Proceedings Act of 1947, the Crown could not be sued in court for a contract it entered into.

Article 299 of the Constitution provides that “all contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President or by the Governor of the State” and that all such contracts and “assurances of property made in the exercise of that power shall be executed” on behalf of the President or the Governor by persons in a manner as directed and authorised by them.

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Further, the phrase ‘expressed to be made and executed’ under Article 299 (1) means that there must be a deed or contract in writing and that it should be executed by a person duly authorised by the President or the Governor on their behalf.

The objective behind Article 299(1), as per the 1954 top court ruling in ‘Chatturbhuj Vithaldas Jasani v. Moreshwar Parashram & Ors’, is that there must be a definite procedure according to which contracts must be made by agents acting on the government’s behalf; otherwise, public funds may be depleted by unauthorized or

illegitimate contracts. It implies that contracts not adhering to the manner given in Article 299(1) cannot be enforced by any contracting party.

However, Article 299 (2) says that essentially, neither the President nor the Governor can be personally held liable for such contracts.

What was the case?

The May 19 ruling delivered by the Bench, also comprising Justices PS Narasimha and JB Pardiwala, dealt with an application filed by Glock Asia-Pacific Limited against the Centre on the appointment of an arbitrator in a dispute.

Glock Asia Pacific entered into a contract with the Ministry of Home Affairs for the supply of 31,756 Glock pistols. Subsequently, there was a dispute between the two parties due to the Centre invoking a performance bank guarantee. A performance bank guarantee, similar to a letter of credit, is the bank's promise that it will meet the debtor's liabilities, provided that he fails to meet the contractual obligations.

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Glock then issue a notice invoking arbitration, nominating a retired [Delhi High Court](#) judge as the sole arbitrator. When the government was called to accept this, it said that the arbitrator's nomination violated one of the tender conditions that said an officer in the Law Ministry, appointed by the MHA Secretary, would be the arbitrator in case of a dispute.

Thus, Glock challenged this clause in the agreement, which allowed a government officer to resolve the difference between the two parties as an arbitrator, as one party here was the MHA itself.

What did the court hold?

One of the major grounds of the challenge given under Section 12(5) of the Arbitration and Conciliation Act, 1996, says that notwithstanding any prior agreement, any person whose relationship with the parties or counsel of the dispute falls under any of the categories in the Seventh Schedule will be ineligible to be appointed as an arbitrator. The Seventh Schedule includes relationships where the arbitrator is an employee, consultant, advisor, or has any other past or present business relationship with a party.

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Deciding the case in Glock's favour, the court observed that the arbitration clause allowed a "serving employee of the Union of India, a party to the contract, to nominate a serving employee of the Union of India as the Sole Arbitrator." Holding this to be in conflict with Section 12(5), the court allowed the present application.

The court also appointed former SC judge Justice Indu Malhotra "as the Sole Arbitrator to adjudicate upon the disputes" in the case.

Referring to the recommendation of the 246th Law Commission Report, which dealt with the issue of contracts with government entities, the court observed that when the party appointing an arbitrator is the State, "the duty to appoint an impartial and independent adjudicator is even more onerous."

Thus, the court rejected the Centre's reliance on Article 299, saying, "Article 299 only lays down the formality that is necessary to bind the government with contractual liability" and not "the substantial law relating to the contractual liability of the Government", which is to be found in the general laws of the land.

What are the requirements for government or state contracts?

In its judgement, the court referred to its 1966 ruling in 'K.P. Chowdhry v. State of Madhya Pradesh. And Others', which laid down essential requirements for government contracts under Article 299.

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In that ruling, the top court had reiterated **three conditions** to be met before a binding contract against the government could arise, namely: “**(1) the contract must be expressed to be made by the Governor or the Governor-General; (ii) it must be executed in writing, and (iii) the execution should be by such persons and in such manner as the Governor or the Governor-General might direct or authorise.**” Prior to this, the Apex Court, in its 1962 ruling in ‘State of Bihar v. Messrs. Karam Chand Thapar’, had laid down these three conditions too.

First published on: 30-05-2023 at 13:12 IST



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